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Supreme Court of the United States

OCTOBER TERM, 1962

No. 16

BANCO NACIONAL DE CUBA,
Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON, DOING BUSINESS AS FARR, WHITLOCK & CO., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 403

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Petitioner,

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PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

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The Respondents, Farr, Whitlock & Co., respectfully pray that this Petition for a Writ of Certiorari be denied.

Statement of the Case

This is an action by Banco Nacional de Cuba against Farr, Whitlock & Co. (hereinafter referred to as "Farr"), a partnership of commodity brokers with offices in New

York City, and Peter L. F. Sabbatino, the Receiver appointed for the assets in New York of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter referred to as "C. A. V."). The complaint alleges conversion by Farr of a certain bill of lading relating to a shipment of sugar from Cuba in August, 1960, and of the proceeds of the sale of the sugar. Farr's answer alleged that the ownership of the sugar in Banco Nacional was contested by C. A. V. and that Farr was therefore merely a stakeholder of the proceeds of the sugar. Upon motion for summary judgment by the plaintiff, Banco Nacional, and cross-motions by the defendants to dismiss the complaint, the District Court dismissed the complaint. The Court of Appeals unanimously affirmed.

The opinion of the District Court is reported at 193 F. Supp. 375 and is printed in the Joint Appendix in the Court of Appeals at pages 153a-173a. The opinion of the Court of Appeals is reported at F. 2d, and is annexed to the Petition herein of Banco Nacional de Cuba as Appendix B thereof at pages 28-68.

Jurisdiction

The Judgment of the Court of Appeals was entered on July 6, 1962. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. Section 1254(1).

Questions Presented

The main question before this Court is whether the courts of the United States may declare invalid or refuse to enforce Cuban Law No. 851 of July 6, 1960, and the decree implementing it of August 6, 1960, which expropriated certain sugar properties in Cuba owned by a corporation organized under the laws of Cuba, but owned and controlled by United States citizens.

A companion question is whether this decree so violated international law as to justify the District Court in denying it recognition or refusing to enforce it.

Since the District Court and Court of Appeals rejected Farr's contention that the complaint should be dismissed for lack of jurisdiction of the subject matter, this question is not presented by this Petition for certiorari. However, if the Petition is granted, Farr will press this argument again as an additional ground for affirming the Judgment of the Court below.

Facts

In February and July, 1960, Farr contracted to buy a quantity of Cuban sugar from General Sugar Estates, Inc. (Joint Appendix in the Court of Appeals 94a- hereinafter referred to as "J. A."). General Sugar Estates, Inc. is a Cuban corporation wholly owned by C. A. V., also a Cuban corporation of which the majority of the stock is owned by United States residents (J. A. 41a, 48a). This sugar, or so much of it as is the subject of this litigation, was loaded more than three miles off the coast of Cuba (J. A. 101a, 102a). Loading on the SS HORNFELS commenced on August 6, 1960 and was completed on August 9th (J. A. 83a, 84a, 96a). By resolution No. 1 promulgated under Law No. 851, of July 6, 1960, which bears the date August 6, 1960, but which respondents claim became effective August 9th, the Executive Power in Cuba purported to nationalize the property of twenty-six named corporations, including C. A. V., owned by United States interests. (Respondents argued in the Courts below that an issue of fact sufficient to defeat Banco Nacional's motion for summary judgment was raised by the fact that title to the sugar may already have passed to Farr when

the August 6th Decree became effective and that the Decree did not attempt to nationalize property belonging to Farr. Respondents will again press this argument if the Petition for certiorari is granted.)

After August 6, 1960, ships carrying Cuban sugar could not leave the area without Cuban government consent. The Cuban government offered to release sugar if the buyers would enter into contracts with a Cuban government agency on terms similar to the buyers' original contracts with the private owners (J. A. 84a, 85a). Farr, of course, had made its own commitments to resell the sugar on the SS HORNFELS (J. A. 85a). After the August 6th Decree the price of Cuban sugar rose steeply (J. A. 85a). Farr, unable as a practical matter to buy Cuban sugar at the current price to meet its commitments, signed contracts covering the sugar on the SS HORNFELS with an agency of the Cuban government, Banco Para el Comercio Exterior de Cuba, which were identical in price and terms to the contracts entered into with General Sugar Estates (J. A. 85a, 92a). Banco Exterior assigned the bills of lading for this sugar shipment to the plaintiff Banco Nacional de Cuba, which in turn sent them to its agent in New York, Societe Generale, New York Agency (J. A. 6a, 29a).

On August 16, 1960, respondent Sabbatino was appointed Receiver of the New York assets of C. A. V. (J. A. 78a).

On August 26, 1960, C. A. V. notified Farr of its claim to the sugar and its proceeds, and Farr and C. A. V. agreed, inter alia, that if Farr should receive the sugar proceeds Farr would hold them pending Court order as to the proper disposition thereof (J. A. 25a, 26a). On that day also, Societe Generale first presented the shipping documents relating to this shipment of sugar on the

SS HORNFELS, but Farr rejected them as incomplete (J. A. 29a).

On August 29, 1960, Societe Generale delivered to Farr a sight draft and the shipping documents relating to the sugar and later on the same day Farr negotiated the bills of lading to its customer and received the purchase price of $175,250.69 (J. A. 37a, 86a, 87a). Finally, at the end of the day, Farr was served with an order of the Supreme Court, Kings County, enjoining Farr from taking any action which might result in the removal from New York of assets claimed by C. A. V. (J. A. 86a). By letter sent the same day Farr notified Societe Generale that Farr had received formal notification of the appointment of the Receiver, that C. A. V. claimed ownership of the sugar, that the Supreme Court restraining order had been served upon it, and that Farr felt obligated to retain the sugar proceeds pending Court determination as to who had title to the sugar (J. A. 86a).

On October 24, 1960, Supreme Court, Kings County, made an Order directing Farr to make summary turn-over of the sugar proceeds to the Receiver (J. A. 56a-58a). Farr therefore filed a cross-claim in this action against the Receiver for the return of the funds in the event that the Court should decide that Banco Nacional is entitled to the proceeds of the sugar (J. A. 50a).

Opinions of the Courts Below

The District Court, in dismissing the Complaint, stated that the crucial question was whether the Court could examine the validity of the Cuban decree under international law and refuse it recognition if it is in violation of international law. The Court emphasized that no court

in this country has passed on the question (Opinion of District Court, J. A. 161a). The Court declared that the so-called "Act of State Doctrine" is a restraint which the courts have imposed upon themselves, but that even if such a rule were to be found in international law, it would manifestly not extend to an act of state which was in violation of such law (Opinion of District Court, J. A. 163a). The District Court stated that since the Cuban government in effect sought directly the aid of the court in implementing its decree it would be "incomprehensible for the forum to implement a foreign violation of international law * * *" (Opinion of District Court, J. A. 164a).

Having determined that the Court of the forum should enforce international law in this case, the District Court went on to find that the Cuban decree did, in fact, contravene international law, in that (1) the expropriation of C. A. V.'s property was not "reasonably related to a public purpose" but was "avowedly in retaliation for acts by the Government of the United States * * *" and "simply reprisal against another government" (Opinion of District Court, J. A. 169a, 170a, 171a); (2) the Cuban decree was aimed exclusively at United States nationals and sought them out for discrimination (Opinion of District Court, J. A. 171a); and (3) the decree "does not provide adequate compensation for the taking of the properties" (Opinion of District Court, J. A. 172a).

The Court of Appeals discussed the Act of State Doctrine in some detail, reviewing the most important of the prior opinions of this Court. The Court, although not rejecting the argument of the District Court that the Act of State Doctrine cases in the Supreme Court have never really passed on the question of whether this Court is free to examine the validity of a foreign decree under

international law and refuse it recognition if it violates such law (Opinion of District Court, J. A. 161a), chose to rely on a narrower and perhaps less controversial ground for affirming the decision of the District Court (Opinion of Court of Appeals, Petitioner's Brief pp. 50-51). The Court found that in the Letter of the State Department dated October 18, 1961, addressed to counsel for the *amici* in this case, and in two subsequent State Department Letters dated November 14, 1961 and April 13, 1961, respectively, the State Department expressed the belief that the United States courts should decide for themselves the status here of the Cuban Nationalization decrees (Opinion of Court of Appeals, Petitioner's Brief, pp. 47 to 49). The Court concluded that this removed "one of the basic reasons for the Act of State Doctrine—the danger that independent judicial decisions might interfere with this country's foreign relations" and left the Court free to examine the validity of the Cuban decree without reference to the executive branch of the government (Opinion of Court of Appeals, Petitioner's Brief, pp. 47 to 49).

The Court of Appeals then proceeded to find, as had the District Court, that all the conditions existed for reaching the conclusion that the August 6, 1960, Cuban decree contravened international law and should not be given effect by our courts. It held, specifically, that whether or not failure to pay adequate compensation for the taking of the property of C. A. V. was a violation of international law in itself, it became so when the inadequate provisions for compensation in the law were coupled with the discriminatory features in the law (Opinion of the Court of Appeals, Petitioner's Brief, pp. 63-66).

Reasons for Opposing the Granting of the Writ

1. Petitioner concedes that both the District Court and the Court of Appeals devoted "careful thought" to this case in their respective opinions (Petitioner's Brief, p. 8). In fact, the opinions in both Courts evidence such exhaustive research and sound application of the law to the facts in the case that it appears wholly unnecessary for this Court to again review the Cuban legislation and the extensive authorities examined in both lower Court opinions, only to reach the same conclusion that the complaint of Banco Nacional de Cuba should be dismissed.

If certiorari is denied, the opinion of the Court of Appeals, analyzing as it does every aspect of the problems raised by the Cuban decree, will serve as a sufficient guide to the United States District Courts in the Southern District of New York and in other Districts in cases involving the validity of the Cuban nationalization laws.

2. The decision on review is not in conflict with cases relied on by Petitioner in support of the Act of State Doctrine (Petitioner's Brief, pp. 9-10). *Underhill* v. *Hernandez*, 168 U. S. 250 (1897); *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918); *Ricaud* v. *American Metal Co.*, 246 U. S. 304 (1918); *Shapleigh* v. *Mier*, 299 U. S. 468 (1937); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d, 246 (2d Cir. 1947); *Salimoff* v. *Standard Oil Company of New York*, 262 N. Y. 220 (1933). These cases held that the courts will not examine the validity of the act of a foreign state under the municipal law of that state or in the light of the public policy of the forum. The principal reason ascribed for this voluntary act of abnegation by the courts is the

desire not to embarrass the executive department of the government in its conduct of foreign relations. But there is a related question under international law which has not been passed upon. The opinion in the District Court pointed out that (Opinion of District Court, J. A. 161a), "• • • Apparently, no court in this country has passed on the question • • •" of whether the courts can examine, *under international law,* the validity of a foreign decree and refuse it recognition as a violation of such law. In fact, as Judge Lauterpacht has pointed out, none of the above cited cases in this Court involved a violation of international law, and in most of them the refusal of the court to examine the validity of the foreign law was because the property seized belonged to nationals of the legislating country and therefore no question of international law was involved (I. Oppenheim, Int'l Law 268 (Lauterpacht Ed. 1955)).

The District Court made the following additional comment (Opinion of District Court, J. A. 163a): "Even if one were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state, such a requirement clearly would not extend to an act of state which was in violation of international law."

See also *I. Oppenheim, International Law,* 267 (8th Ed., Lauterpacht, 1955). In fact, our courts have a duty to enforce international law and reconcile their decisions with the principles of international law. *Paquete Habana,* 175 U. S. 677 (1900). See also *Bergman* v. *De Sieyes,* 170 F. 2d 360 (2d Cir. 1948).

Moreover, even under the doctrine of the "Act of State Doctrine" cases, our courts are not restrained from examining into the merits of a foreign decree under

foreign municipal law if the Executive Department has made known the fact that such inquiry will not embarrass the government in its conduct of foreign relations. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir., 1954). Petitioner belittles the authority of this case (Petitioner's Brief, p. 11), but clearly, if the principal basis for the restriction on our courts imposed by the Act of State Doctrine is to avoid conflict with the Executive Branch, then any expression by the Executive disclaiming such conflict should serve to free the courts from this restraint.

Petitioner argues that there are no substantial standards of international law to apply to the problem of validity of the Cuban decree and that the substantive rules of international law which the Court found that the Cuban decree violated are supported by only meagre authority. However, in addition to the authorities cited by the Court of Appeals, the District Court cited a considerable number of foreign cases and legal commentators and text-writers evidencing willingness to examine the validity of foreign acts under international law (Opinion of District Court, J. A. 162a).

No doubt there is some conflict and disagreement among text-writers and the courts in other jurisdictions over the international law rules laid down by the Court of Appeals and the District Court in support of this decision. But the trend of world opinion in favor of these rules can hardly be questioned, and our courts are not excused from helping to formulate and give effect to this trend simply because, as Petitioner contends, the authorities do not yet hold a uniform opinion on the subject.

The Court of Appeals appreciated the "nebulous nature of the substance we call international law" and stated:

> "But until the day of capable international adjudication among countries, the municipal courts must

be the custodians of the concepts of international law, and they must expound, apply, and develop that law whenever they are called upon to do so." (Opinion of Court of Appeals, Petitioner's Brief, p. 53.)

The Court of Appeals recognized, in this connection, the danger of the Court of the forum projecting a parochial concept of right and wrong into a principal of international law. But surely the rule of law which the Court of Appeals found the Cuban decree to violate—failure to provide adequate compensation for property seized from a particular class of aliens—is not simply an aspect of our own public policy but a principal demonstrably cherished by other civilized people. American Branch of the International Law Association, Proceedings and Committee Reports 68 (1957-58); *Anglo-Iranian Oil Co., Ltd.* v. *S.U.P.O.R.*, Italian Civil Court of Rome, 1954, (1955) Int'l L. Rep. 23, 42; *McNair, The Seizure of Property and Enterprises in Indonesia,* 6 Netherlands Int'l L. Rev. 218, 243 (1959).

3. Petitioner argues that the Cuban Statute did contain provision for compensation (Petitioner's Brief, p. 14), but it seems clear that the District Court and the Court of Appeals were correct in considering these provisions a travesty of fair compensation and treating them as a nullity (Opinion of District Court, J. A. 172a; Opinion of Court of Appeals, Petitioner's Brief, p. 55-56). Petitioner maintains that the provisions for compensation in Cuban Law No. 851 are no less adequate than those found in the Iranian Oil nationalization Statute approved by the Italian Court in *Anglo-Iranian Oil Co., Ltd.* v. *S. U. P. O. R.* (Rome) (1955), Int'l L. Rep. 23 at

p. 36. Under the Iranian Statute the government was authorized to provide compensation by depositing in a bank an amount up to 25% of the normal income from the oil, so that some although not equivalent compensation might be received by the persons deprived of their property. The Italian Court found that the Iranian law provided for actual and not an *illusory* compensation, and pointed out that the Iranian government, in proceedings before the International Court of Justice, not only recognized the right of the Anglo-Iranian Oil Company to compensation but also the fact that such right could be protected by proceedings in the ordinary Iranian Courts. *Anglo-Iranian Oil Co., Ltd.* v. *S.U.P.O.R., supra,* pp. 36, 37. On the other hand, as the careful analysis of the Cuban Law 851 in the opinion of the District Court clearly discloses, the compensation provided for under the Cuban law was illusory and as a practical matter no compensation could ever be obtained. Unlike the Iranian nationalization law, Article 6 of Cuban Law No. 851 specifically provided that no appeal or remedial action could be taken with respect to the law.

4. Petitioner seeks to minimize the retaliatory aspects of the Cuban decree against United States citizens on the ground that such retaliation was justified by the July 6, 1960 amendment to the Sugar Act of 1948 (Pub. L. 86-592, 74 Stat. 330, amending Act of August 8, 1947, c. 519, 61 Stat. 922; 7 U. S. C. 1100-1161). However, the reduction of the Cuban sugar quota was no more than the withdrawal of a favor previously conferred. Certainly a nation may decide from what sources it will buy its sugar without offending principles of international law. Whether or not this amendment to the Sugar Act was fair to Cuba, it can hardly be deemed justification for the confiscation

of private property under circumstances which, if considered without reference to the Amendment to the Sugar Act, contravene international law (Opinion of District Court, J. A. 168a, 169a, 170a; Court of Appeals opinion, Petitioner's Brief, p. 64).

5. In spite of the fact that the Cuban decree discloses in its preamble that its very purpose is to discriminate against nationals of the United States (J. A. 112a, 113a), petitioner contends that sooner or later all Cuban sugar mills and enterprises were nationalized, so that ultimately United States and Cuban citizens were treated equally (Petitioner's Brief, pp. 16, 17). However, Cuban owned sugar enterprises were not seized until October 13, 1960, and had the properties and enterprises in which United States nationals had a controlling interest not been nationalized several months earlier, on August 6th, this suit would never have been brought. In that event C. A. V. would have still owned the sugar shipped on the SS HORNFELS and Farr would have been able to pay the proceeds of its sale in New York to that company with impunity. The loss which Farr or C. A. V. (or the Receiver) may suffer in this action is therefore the direct result of the sudden seizure in August, 1960, of these particular United States citizen-owned properties (See Opinion of Court of Appeals, Petitioner's Brief, p. 65).

6. Petitioner professes to see a conflict between the Court below and the Court of Appeals for the Fourth Circuit in the case of *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (D. C. E. D., Va., 1961), affirmed 295 F. 2d 24 (C. A. 4, 1961) applications for stay denied, this Court, September 11, 12 and 14, 1961 (Petitioner's Brief, p. 18) (Referred to as the *Bahia de Nipe* case). United Fruit

Sugar Company filed a libel against the Bahia de Nipe, a vessel owned by the Cuban government, when she was brought into the port of Norfolk, Virginia. United Fruit claimed title to the cargo of sugar on the ground that the Cuban nationalization decree, the same under consideration in this case, which purported to divest the company of its title in the sugar, was invalid. The Attorney General filed a suggestion of immunity with the District Court which was accepted by that Court and the libel was vacated. The District Court recognized that United Fruit had been deprived of its property without payment of compensation, but held that under the government's suggestion of immunity the Court was precluded from finding, as it would if permitted to do so, "that the title to the cargo of sugar remains in the United Fruit Sugar Company." *Rich* v. *Naviera Vacuba, S.A., supra,* 197 F. Supp. at p. 724. The Court of Appeals, far from determining, as Petitioner claims (Petitioner's Brief, p. 19), that the Cuban government had title to the sugar, clearly agreed with the District Court that it could not examine the question. The Court stated (295 F. 2d at p. 26):

> "Despite these contentions (claim of United Fruit to the sugar), we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court *without further inquiry*[1] • • •"

There is therefore no conflict between the Court of Appeals for any other circuit which would justify on that ground the granting of this Petition for certiorari.

7. The record contains the text of two diplomatic notes from the Department of State delivered by the

[1] Italics ours.

United States Ambassador to Cuba to the Cuban Ministry of Foreign Relations on July 16, 1960 and August 9, 1960, protesting the seizure of United States owned properties under Nationalization Law No. 851 of July 6, 1960 and the implementing decree of August 6, 1960, and declaring the seizures contrary to international law (J. A. 63a, 64a, 65a; Department of State Bulls. 171 (1960) and 316 (1960)). The District Court, relying on these notes, concluded that the Executive Branch would not be embarrassed by an examination of the Court into the validity of the Cuban nationalization law (Opinion of District Court, J. A. 164a). This assumption appears particularly justified in view of the fact that the Court reached the same conclusion as the State Department that the seizures under the Cuban law were discriminatory, failed to meet the "most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation" and interfered with the rights of American citizens acquired under international law (J. A. 63a, 64a, 65a).

8. The Court of Appeals had evidence before it, though not in the record, of the desire of the State Department that the Courts examine independently the validity of the Cuban decree in the letters of October 18, 1961, and April 13, 1961, printed in Appendix V to the Brief in the Court of Appeals of the Amici Curiae (Opinion of Court of Appeals, Petitioner's Brief, p. 48), in which the State Department made it quite clear that whether or not the Cuban nationalizations will be given effect in the United States is for the Courts to determine.

Nor is the position of the Department of Justice in the memorandum filed in this Court in the *Bahia de Nipe*

case (*supra*) (Petitioner's Brief, Appendix A) inconsistent with the State Department's position as disclosed in these letters. The government intervened in that case solely for the purpose of protecting Cuba's claim of Sovereign Immunity which had been challenged by the libellant's in spite of the Attorney General's clear suggestion of immunity to the District Court. In fact the Legal Adviser to the State Department pointed out in the October 18, 1961, letter addressed to counsel for the amici in this case that "The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter * * *" (Opinion of Court of Appeals, Petitioner's Brief, p. 48).

The Courts have a function to perform as the guardians and interpreters of international legal standards, as well as the public policy of the forum, and valid as the doctrine of the separation of powers may be in our system of government, the courts should seize their prerogative and decide these matters when the Executive Branch has given any public indication whatever that the decision of the courts will not interfere with the conduct of foreign policy. See Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 833 (1959). In fact it has recently been suggested that the question of whether inquiry into the validity under international law of the act of a foreign state will prejudice the conduct of the foreign relations of the United States should not arise or deter a court from such inquiry unless the Department of State has taken the initiative and itself indicated to the Court in a particular case that the conduct of foreign relations will be prejudiced thereby. See Association of the Bar of the City of New York, Report of the Committee on Interna-

tional Law, *A Reconsideration of the Act of State Doctrine in the United States Courts, Recommendation*, 15, 16 (May 1959).

9. If interference with the prerogative of the Executive is not a ground in this case for the Court's refusing to examine the validity of the Cuban decree under international law, no other valid reason exists for applying the Act of State Doctrine in this case. Another reason sometimes advanced for the Doctrine is the alleged necessity for security and certainty of titles to property in international trade. Where the litigant who invokes the Act of State Doctrine to protect his title is an innocent third party, there may be some justification for refusing to examine the validity of a foreign act. But it is otherwise where the plaintiff is the country which has expropriated the property and seeks the aid of the forum to enforce its decree which is regarded by the forum as obnoxious to international law as well as to its own public policy. This is precisely the situation in this case, as the Court of Appeals aptly pointed out (Opinion of Court of Appeals, Petitioner's Brief, p. 51). See 75 Harv. L. Rev. 1618 (June 1962); 110 U. Pa. L. Rev. 122, 127-128 (1961).

10. Petitioner, finally, argues that the Court below was wrong in treating C. A. V., the owner of the nationalized property in question, as an alien rather than a national of Cuba because the majority of its shareholders were foreign. It seems, however, that the Cuban government has settled this question in this case, whatever the law may be under another set of facts and circumstances. This is not a case of C. A. V. or a group of its stockholders coming into Court and asking relief from the consequences of the corporation having

been organized under the laws of a foreign state. Such was of course the situation in *The Pedro*, 175 U. S. 354, and in *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, relied on by Petitioner for the proposition that C. A. V. is a Cuban entity for the purposes under consideration (Petitioner's Brief, p. 23). In this case, however, Banco Nacional, an instrumentality of the Cuban government, comes into Court and asks the Court to grant it affirmative relief under a law which specifically singles out C. A. V. because it is owned or controlled by nationals of the United States. The law disregards the fact that the enterprise is organized under Cuban law. Other enterprises which are organized under Cuban law but are also owned by Cubans are not included in this nationalization decree of August 6, 1960. The Cuban government, therefore, itself made the determination that C. A. V. was a United States enterprise and it has profited thereby; certainly the Cuban government can not now, for the purposes of this litigation, divorce C. A. V. from the nationality of its stockholders.

The Court of Appeals correctly disposed of this question when it said (Opinion of Court of Appeals, Petitioner's Brief, p. 54):

> "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction."

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

October 4, 1962.

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